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Committee on Social Affairs, Health and Sustainable Development

Safeguarding democracy, rights and the environment in international trade

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Report¹

A. Draft resolution²

1. Our shared values – human rights, democracy, and the rule of law – are becoming more and more recognised as critical in the context of global trade. International trade and investment agreements trump domestic law and can have a long-lasting legacy. A wave of new generation [bilateral] trade agreements is increasingly shaping norms and influencing policies of sovereign States while the multilateral trading system embodied by the World Trade Organization (WTO) is being weakened. Because trade arrangements evolve with society and its increased attention to sustainability issues and human dignity, individual countries and trading blocs should make every effort to develop trade in ways that help support our shared values and progress in society, such as through targeted co-operation, capacity building, pursuit of sustainable development, and enhanced commitments to preserve and improve our fundamental rights and our quality of life. Purely economic trade agreements do not automatically protect or promote these values and can in practice undermine them. Therefore, rights, obligations and enforcement of these values should be incorporated into them at the outset so that they are not systematically trumped by those of investors for generations to come.

2. The Parliamentary Assembly views trade and investment agreements as a powerful tool for advancing progress and believes that trade policies should be constantly adapted to societal realities and priorities. Seeing a sustained increase in both the volume and the geo-political significance of trade and investment agreements in the last decade, the Assembly reiterates its concern over the use of narrow-focus arbitration courts to resolve disputes between States and private investors in a way that hampers the ability of States to defend the public interest, including as regards public health and human rights, and to honour their international commitments to sustainable development. It strongly supports proposals to replace the outdated investor-state dispute settlement system with a new Multilateral Investment Court based on the outcomes of current negotiations under the auspices of the United Nations Commission on International Trade Law (UNCITRAL).

3. The Assembly considers the multilateral rules-based system supported by the WTO as the most inclusive and balanced mechanism on a global scale, especially when it comes to ensuring a level playing field among small and big countries in trade matters. To this end, WTO rules and its Dispute Settlement mechanism play a crucial role. The Assembly is concerned by the fact that this mechanism has been blocked since December 2019 because its Appellate Body can no longer deliver binding decisions on inter-State trade disputes. The Assembly therefore appreciates that, pending a solution to this situation, the European Union (EU) and other WTO members have put in place a multi-party interim appeal arbitration arrangement and continue to work together on the reform of the WTO's Dispute Settlement mechanism to enhance its effectiveness.

4. The Assembly welcomes recent positive developments, notably the inclusion of sustainable development provisions in new trade treaties and the framing of corporate due diligence requirements by European countries, so as to support fundamental rights and environmental objectives through trade policies. It underscores the need to realise the potential of trade treaties and the related dispute settlement mechanisms to ensure the more ambitious implementation of global environmental treaties and Sustainable Development Goals.

5. The Assembly underlines that trade treaties can be a means to enhance the protection of the environment and fundamental rights. It notes that investment protection provisions have been highly effective

¹ Reference to Committee: Reference no. 4536 of 12 October 2020.

² Draft resolution adopted unanimously by the Committee on 16 March 2023.

in shielding the interests of private enterprises rather than fundamental rights and the public interest, because they provide a powerful mechanism to enforce the rights guaranteed by the treaties against states. While trade and investment treaties often contain provisions on fundamental rights, labour rights, public health, and environmental standards (collectively “democracy enhancing provisions”), these provisions do not benefit from the same powerful enforcement mechanisms as the provisions which benefit investors. States should thus consider how to enhance the potential for citizens to enforce compliance with those provisions as well as continuing their efforts to reform these enforcement mechanisms and render them better adapted to new realities. This could empower individuals in a field uniquely suited to judicialisation – rights protection – while at the same time making the treaties themselves more effective.

6. The Assembly acknowledges that lawful unilateral measures in international trade (in particular the EU’s carbon border adjustment mechanism) may be necessary for States to pursue their ambition of advancing more rapidly towards sustainable and inclusive development. These can encourage similar initiatives worldwide, which helps to ensure policy coherence and compatibility with the WTO rules. States should continue to take advantage of all lawful possibilities offered by international trade and investment law to act unilaterally, including through the adoption of measures under Article XX of GATT (General Agreement on Tariffs and Trade) and the WTO Agreements on Safeguards and on Sanitary and Phytosanitary Measures.

7. The Assembly believes that “old generation” trade agreements should be interpreted and adapted in the light of new imperatives to promote sustainable development and fundamental rights. It notes unexpected legal complications in the process of the modernisation of certain treaties (notably the Energy Charter Treaty, ECT) whose sunset clauses or narrow interpretation by private arbitration tribunals in the framework of the investor-state dispute settlement system expose States to expensive litigation, the lowering of standards aimed at protecting public health and the environment and reducing climate change, and even policy reversals under pressure from influential enterprises.

8. Regarding the specific issues linked to the ECT, the Assembly urges States to close the gap between the protection of investment in fossil fuels and the mainstreaming of climate goals by concluding an *inter se* agreement on the modification of the sunset clause of this treaty as permitted by international law according to Articles 41 and 64 of the Vienna Convention on the Law of Treaties (1969). This would send a clear message to other State Parties, national courts, and arbitrators that such a long-lasting sunset clause is incompatible with those States’ commitments under the Paris Agreement and the ECT’s Preamble which refers to the UN Framework Convention on Climate Change under the auspices of which the Paris Agreement was signed. The Assembly strongly supports the ultimate goal of a co-ordinated revision of the ECT with a view to reducing or suppressing the sunset clause in relation to investment in fossil fuels and taking into account the environmental benefits of doing so.

9. In the light of the above considerations, the Assembly asks member States to:

9.1. support multilateral negotiations towards the reform of the WTO’s Dispute Settlement mechanism for inter-State trade disputes on the one hand, and the establishment of a Multilateral Investment Court under the auspices of the United Nations for enterprise versus State disputes on the other hand;

9.2. ensure that all their new trade and investment agreements contain comprehensive provisions on sustainable development and protection of fundamental rights and strengthen enforcement mechanisms for these provisions, commensurate with those protecting investors;

9.3. assess their existing trade and investment commitments under the “old generation” treaties and, where necessary, launch their revision with a view to upgrading them with provisions on sustainable development and protection of fundamental rights, so as to ensure that they contribute to and are compliant with the implementation of global environmental treaties and the Sustainable Development Goals;

9.4. use trade and investment agreements as tools to promote democratic norms and human rights, including social rights, on a global scale;

9.5. systematically involve parliaments in negotiations towards the conclusion or reform of any trade and investment treaties in order to enhance democratic scrutiny and transparency of the process before the final ratification of such agreements;

9.6. where necessary, consider taking lawful unilateral measures in international trade to enforce domestic environmental standards at the border based on the EU’s carbon border adjustment mechanism, and consider extending such measures to also cover fundamental rights, including labour rights, and public health;

9.7. promote corporate due diligence obligations through trade with regard to the protection of the environment, fundamental rights, and public health, and mitigating climate change.

10. The Assembly calls on national parliaments to hold governments to account in relation to the negotiation of any new trade treaties, the reform of existing trade arrangements and investment protection agreements, and the pursuit of more ambitious implementation of global environmental treaties and Sustainable Development Goals at national level.

B. Draft recommendation³

1. The Parliamentary Assembly refers to its Resolution xxxx (2023) on “Safeguarding democracy, rights and the environment in international trade”. It underscores the close interdependence between policies pursued by the Council of Europe member States in the area of trade and investment and the implementation of shared values “in the interests of economic and social progress” as stated in the Organisation’s Statute. International trade arrangements must evolve with society and reflect its increased attention to human dignity and sustainable development.
2. Considering the imperative for the Council of Europe and its member States to contribute to the achievement of the United Nations Sustainable Development Agenda and Goals aimed at promoting human prosperity worldwide while protecting the planet, the Assembly emphasises the need to rebalance States’ economic, social, and environmental commitments at global and domestic levels, including through trade policies and agreements.
3. The Assembly therefore reiterates its proposals for action by member States, as contained in its Resolution xxxx (2023), and urges the Committee of Ministers to recommend in turn that member States’ governments:
 - 3.1. support multilateral negotiations towards the reform of the WTO’s Dispute Settlement mechanism for inter-State trade disputes on the one hand, and the establishment of a Multilateral Investment Court under the auspices of the United Nations for enterprise versus State disputes on the other hand;
 - 3.2. ensure that all new trade and investment agreements contain comprehensive provisions on sustainable development and protection of fundamental rights and strengthen enforcement mechanisms for these provisions commensurate with those protecting investors;
 - 3.3. assess existing trade and investment commitments under the “old generation” treaties and, where necessary, launch their revision with a view to upgrading them with provisions on sustainable development and protection of fundamental rights so as to ensure that they contribute to the implementation of global environmental treaties and the Sustainable Development Goals;
 - 3.4. use trade and investment agreements as tools to promote democratic norms and human rights, including social rights, on a global scale;
 - 3.5. systematically involve parliaments in negotiations towards the conclusion or reform of any trade and investment treaties in order to enhance democratic scrutiny and transparency of the process from the negotiation mandate to the final ratification of such agreements;
 - 3.6. where necessary, consider taking lawful unilateral measures in international trade to enforce domestic environmental standards at the border based on the European Union’s carbon border adjustment mechanism, and consider extending such measures to also cover fundamental rights, including labour rights, and public health;
 - 3.7. promote corporate due diligence obligations through trade with regard to the protection of the environment, fundamental rights, and public health;
 - 3.8. work together for a co-ordinated revision of the Energy Charter Treaty (ECT), in order to minimise the length of the sunset clause and its negative impact on the environment, climate change, and fundamental rights.

³ Draft recommendation adopted unanimously by the Committee on 16 March 2023.

C. Explanatory memorandum by Mr Geraint Davies, rapporteur

1. Introduction, aim and scope of this report

1. Our shared values – human rights, democracy, and the rule of law – are not for sale. However, they are increasingly relevant in the context of global trade. As noted in the motion for a resolution ([Doc 15144](#)) recently tabled by the Committee on Social Affairs, Health and Sustainable Development, we see a wave of new generation trade agreements which increasingly “govern and establish norms of behaviour within and between States” while at the same time the multilateral trading system embodied by the World Trade Organization (WTO) is being weakened.

2. We are witnessing a sustained increase in both the volume and the geo-political significance of trade and investment agreements (TIAs).⁴ 2021 saw the highest ever number of notifications to the WTO of new agreements in force. This is in line with a consistent cumulative year on year increase in agreements in force since 2006.⁵ We have also seen, since 1992, a sustained increase in the number of multi-lateral/regional trade agreements.⁶ The cumulative effect of these developments is that a greater volume of global trade takes place subject to the provisions of TIA than ever before.

3. The Parliamentary Assembly first raised this matter in relation to social rights, public health and sustainable development,⁷ as well as with regard to arbitration between states and investors.⁸ It expressed concern that such trade and investment protection agreements would “grant new powers for transnational companies to use arbitration courts [...] to sue member States for laws they pass that could impede future profits.”⁹ Moreover, the Assembly saw a lack of transparency and public or parliamentary scrutiny in the process of negotiations over such agreements and feared unfair distribution of any economic gains from those agreements. It considered that “the new generation trade agreements should be designed to promote environmental sustainability, human rights and the rule of democratic law, and to facilitate the mutual benefits of trade.”¹⁰

4. As rapporteur I believe that it is time for this Assembly to assess if the earlier concerns expressed over the protection of our shared values have been duly considered by the member States. This report therefore seeks to take stock of recent developments in the domain of trade and investment agreements, in particular in terms of democratic scrutiny over “the setting of the negotiating mandate, the conduct of negotiations, and the conclusion of [such] agreements”.¹¹ The report also considers how the Council of Europe’s core values are promoted through those agreements and how essential rights are upheld in terms of sustainable development, public health and environmental and food standards. It seeks to establish whether such agreements actually support implementation of the Paris Agreement on climate change and the UN Sustainable Development Agenda 2030. There may be shared interest agendas the international community can pursue through trade across democracies and autocracies, in particular to mitigate climate change collectively.

5. Finally, this report considers how “old generation” trade agreements should be interpreted and adapted in the new light of imperatives to promote sustainable development and shared values. In particular, as trade accounts for 25% of greenhouse gas emissions¹² and has an influence over the relative economic power of democracies and autocracies, the rules of conducting trade have an enduring impact on our environment and shared values. As trade can be influenced by war, unilateral measures, economic sanctions, and other geopolitical phenomena, it is not a value-free economic activity. Trade rules therefore need to be considered in terms of their impact on our values and shared environment – beyond the interests of particular industries

⁴ Maluk J., Glanemann N., and Donner R. V., “Bilateral Trade Agreements and the Interconnectedness of Global Trade”, *Front. Phys* (27 November 2018).

⁵ See https://www.wto.org/english/tratop_e/region_e/region_e.htm#facts.

⁶ See <https://wits.worldbank.org/gptad.html>. This database provides information on preferential trade agreements worldwide, including agreements that have not been notified to the WTO.

⁷ See [PACE Resolution 2152 \(2017\)](#) on “New generation” trade agreements and their implications for social rights, public health and sustainable development (and report by Mr Geraint Davies, United Kingdom, SOC, on behalf of the Committee on Social Affairs, Health and Sustainable Development, Doc 14219).

⁸ See [PACE Resolution 2151 \(2017\)](#) on “Human rights compatibility of investor–State arbitration in international investment protection agreements” (and report by Mr Pieter Omtzigt, Netherlands, EPP/CD, on behalf of the Committee on Legal Affairs and Human Rights, Doc 14225, and opinion by Mr Geraint Davies, United Kingdom, SOC, on behalf of the Committee on Social Affairs, Health and Sustainable Development, Doc 14255).

⁹ See [PACE Resolution 2152 \(2017\)](#), paragraph 2.

¹⁰ See [PACE Resolution 2152 \(2017\)](#), paragraph 8.

¹¹ See the motion for a resolution ([Doc 15144](#)) on “Safeguarding democratic values in international trade”.

¹² See World Trade Report 2022: Climate change and international trade, WTO, Geneva.

or economies. Indeed, as one participant stressed at the WTO's Public Forum 2022¹³, "trade should be governed by rules, not power" and no single country can solve any big problem alone.

6. In the light of the above remarks, the report focuses on three areas: (1) Democratising TIAs through the exploration of domestic and international best practice in order to identify recommendations for easing the tensions between TIAs and democratic governance; (2) Promoting Council of Europe core values through TIAs – consideration of practical proposals to safeguard democracy, human rights and the rule of law through TIAs, based on existing best practice and proposals from academic and policy-development literature; (3) Reinforcing policy coherence and action to support sustainable development in the light of the global climate treaties and Sustainable Development Goals.

2. Two "generations" of trade and investment agreements (TIAs)

7. The development of TIAs since the Second World War can be broadly described in two "generations".¹⁴ The first generation emerged following the collapse of European colonial empires. Newly free states needed to attract investment from overseas ("foreign direct investment" – FDI). Investors, however, were wary of doing business in such states due to concerns around political instability and the independence of local courts. Newly free states consequently signed trade agreements with their former colonisers. These agreements conferred various trade privileges (generally focused on market access and tariffs for goods) while also guaranteeing the property of investors and creating the Investor-State Dispute Settlement (ISDS) mechanism. ISDS allows investors to settle disputes with host states in an independent international tribunal; however, there have been growing concerns about the transparency, the consistency of decisions and the high cost of such arbitration. While opinion is divided about the desirability of such first-generation agreements, with some experts suggesting that these were merely a continuation of a form of colonialism by other means, they appear to have had some effect in encouraging FDI.¹⁵

8. The second generation of trade and investment agreements emerged from the early 1990s. Second generation agreements are distinct from first generation agreements in three principal ways:

- Second generation agreements encompass a far broader range of policy areas: in addition to tariffs and investment, they often cover intellectual property, sanitary and phytosanitary provisions, technical barriers to trade, subsidies, trade in services, visas, recognition of professional qualifications, domestic regulation, telecommunications and electronic commerce, competition, and procurement.¹⁶
- Investment protection provisions (IPP) in second generation agreements are often given a far broader reading. They go beyond merely protecting private property and give investors rights beyond those enjoyed by citizens. This can allow investors to, in effect, veto public policy (even when it has popular support), for example, by forcing a state to withdraw fuel safety regulations,¹⁷ or by requiring a state to pay substantial sums because a policy change may impinge on expected future profits¹⁸ (such as with the phasing out of nuclear power prompted by the Fukushima accident) or to roll back measures protecting the environment and outstanding landscapes.¹⁹
- Many trade agreements create committees of officials to oversee the functioning of the agreement. These committees often have substantial powers to change certain parts of the agreement but are wholly unaccountable despite exercising powers that may influence legislation.

9. Although some international treaties do not resemble trade and investment agreements at first sight, they may have a major influence on public policies through ISDS mechanisms. One such treaty is the Energy Charter Treaty (ECT) crafted in the mid-1990s with a noble goal of supporting multilateral co-operation on energy issues; it was later instrumentalised by some fossil fuel companies to sue States and claim exorbitant compensations in reaction to climate-friendly policy turns. According to the International Institute for Sustainable Development, "17% of all investor–state disputes from fossil fuel investors have been brought under the ECT – more than under any other international investment agreement". Although recent negotiations to modernise the treaty promised substantive improvements, the proposed changes announced in June 2022 still leave extensive protection for existing fossil fuel investments through the so-called sunset clauses in some

¹³ WTO Public Forum 2022 "[Towards a sustainable and inclusive recovery: ambition to action](#)", 27-30 September 2022, Geneva (Switzerland).

¹⁴ Fowles S., "[How investment treaties have a chilling effect on human rights](#)", Foreign Policy Centre (2017).

¹⁵ Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law*, (Cambridge; Cambridge University Press, 2007), pp. 32-114.

¹⁶ See, for example, https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/index_en.htm.

¹⁷ *Ethyl Corporation v. The Government of Canada*, UNCITRAL.

¹⁸ *Vattenfall v. Germany*, ICSID Case No. ARB/09/6, <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/329/vattenfall-v-germany-i->.

¹⁹ *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, 39 ILM 317 (2000).

20 contracting parties (including the EU and the United Kingdom), mainly aiming to eliminate intra-EU litigation, with still much legal uncertainty for both governments and investors.²⁰

10. During the hearing held on 2 December 2022, our committee members had the possibility to discuss ECT-related challenges with Guy Lentz, ECT Secretary General, Marie-Pierre Vedrenne, MEP (Renew Europe, France), and Catherine Banet, Head of the Energy and Resources Law Department, Scandinavian Institute of Maritime Law, University of Oslo (Norway). The discussion demonstrated how complex the situation is and how difficult it is to reform the existing treaty. In short, the ECT reform is uniquely challenging for two main reasons: first, the treaty contains a 20-year sunset clause, and second, this treaty is a multilateral one with a rigid amendment procedure, which entrenches the status quo situation.²¹ A co-ordinated departure of EU countries from the treaty does not seem to be an option due to the opposition of some countries.

11. In this context, we should recall that, at the request of Belgium in 2017, the EU seeks to establish a Multilateral Investment Court (MIC) and has already replaced the ISDS mechanism with bilateral investment court systems (ICS) in its recently negotiated international investment agreements, such as those with Canada, Mexico, Singapore, and Vietnam. Those agreements also provide for the gradual transition from the bilateral ICS to a permanent MIC in due course.²² The European Parliament in turn has called for the EU and its member States not to sign or ratify any investment protection treaties that include the ISDS mechanism. Moreover, recent EU case law (notably the *Komstroy* case) has established that ISDS provisions under the ECT are not applicable in the case of intra-EU disputes. However, private arbitration tribunals are not bound to accept this argument as a procedural objection.

3. The multiple layers of the global trade system

12. Global exchanges of goods, services and capital across borders are generally framed by trade agreements at multiple levels: bilateral (between two states), regional (between several trading partners, such as NAFTA or North American Free Trade Agreement covering Canada, the USA and Mexico; APEC or Asia-Pacific Economic Co-operation trade agreement with 21 countries; and the EU's framework agreements with trading partners) and multilateral (driven by the WTO since 1995 and GATT²³ between 1948 and 1994).

13. It is important to understand this multi-layered architecture of agreements so as to concentrate political efforts on advancing the values we defend on a broadest possible scale. Indeed, the application of values, standards and policies may occur through multilateral, regional and bilateral trade settings, as well as through unilateral measures. These trade facilitation agreements may be used in concert and dynamically to encourage improvement and compliance. As it were, the "public morality" provision under the GATT agreement provides some basis for the evolution of interpretations concerning the values of human rights, the rule of law and democracy in a multilateral context. Moreover, the 'new generation' of EU's trade agreements systematically includes sustainable development chapters (the so-called TSDs).

14. The multilateral rules-based system supported by the WTO is the most inclusive and balanced mechanism on a global scale. It gives considerable weight to small countries, especially when it comes to defending their interests versus big players by activating the WTO's Dispute Settlement mechanism and ultimately triggering corrective measures. However, this Dispute Settlement is currently blocked since 11 December 2019 because its Appellate Body can no longer deliver binding decisions on inter-State trade disputes. Pending a solution to this situation, the EU and other WTO members put in place a multi-party interim appeal arbitration arrangement; they continue to work together on the reform of the WTO's dispute settlement mechanism to ensure its effectiveness.

15. The EU's carbon border adjustment mechanism (CBAM)²⁴ is a leading example of unilateralism enforcing domestic environmental standards at the border by imposing CBAM certificates to be bought by importers of carbon-intensive products.²⁵ It helps accelerate transition to cleaner domestic production while

²⁰ See the statement "[Newly Released Text for Modernized Energy Charter Treaty Shows Too Many Potential Obstacles for Climate Action](#)" by the International Institute for Sustainable Development, 13 September 2022.

²¹ "Sunset Clauses in International Law and their Consequences for EU Law" (PE 703.592), Policy Department for Citizens' Rights and Constitutional Affairs of the Directorate-General for Internal Policies of the European Parliament, January 2022.

²² See [https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-multilateral-investment-court-\(mic\)](https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-multilateral-investment-court-(mic)) for more information.

²³ The General Agreement on Tariffs and Trade. It mainly governed trade in goods, while the WTO and its various agreements also cover trade in services and intellectual property. The WTO's inception also created new procedures for the settlement of disputes (the Dispute Settlement Mechanism).

²⁴ See https://ec.europa.eu/taxation_customs/green-taxation-0/carbon-border-adjustment-mechanism_en for more information on the EU's Carbon Border Adjustment Mechanism proposed on 14 July 2021 by the European Commission and endorsed by the European Council on 15 March 2022.

²⁵ Those certificates' price is determined in accordance with the pricing of carbon under the Emissions Trading Scheme.

rendering imports of “dirty” goods and the relocation of production to countries with low environmental standards less attractive. While being fully compatible with the international trade rules, CBAM encourages EU’s trading partners to enhance their climate-friendly ambitions and could serve as a basis for retrofitting the “old generation” trade agreements. CBAM also suggests that at-border adjustments may be possible to support not only environmental but also social values and labour rights. Moreover, EU’s leadership on due diligence requirements promotes supply chains that are human rights compliant and ensure environmental sustainability.²⁶

16. Furthermore, as highlighted during the WTO Public Forum 2022, a sub-set of WTO countries is currently discussing investment facilitation mechanism in order to overcome problems linked to the investment protection provisions and their often brutal enforcement through the ISDS system. This is a so-called Joint Statement Initiative (JSI), aiming to ease regulatory red-tape and streamline administrative procedures around investment, together with more coherent and more transparent domestic framework for attracting foreign direct investment. Talks on the JSI expressly exclude dispute settlement, market access and investment protection issues. When concluded, the JSI proposal could potentially reduce tensions around ISDS clauses in international investment agreements by promoting the prevention of disputes, notably around State policies for more sustainable investment, and greater co-operation between developed and developing countries towards the latter’s capacity-building.

4. Impacts on democracy: challenges and opportunities

17. Most trade and investment agreements are not subject to the same level of scrutiny as domestic legislation, yet they can have similar impacts. They can allow private individuals and enterprises to influence public policy by exercising special rights denied to citizens (as mentioned above). Even when investors choose not to enforce their rights through the ISDS route, the mere possibility of such action can discourage governments from pursuing popular policies (several states, for example, delayed or shelved bans on tobacco advertising after the *Phillip Morris v. Uruguay* case).²⁷

18. Trade and investment agreements can also force legislatures to change the law. Where the executive branch agrees an international treaty which is incompatible with domestic law, legislatures (in practice) have little choice but to change domestic law accordingly.²⁸ Moreover, the committees of officials created by various trade and investment agreements are able to influence various areas of public policy to ensure that they cohere with the parent agreement.

19. Trade and investment agreements are not, however, subject to a level of scrutiny commensurate with their impact. Foreign affairs are generally the preserve of the executive branch of government. This means that ministers and officials enjoy significant latitude in the negotiating and agreeing of such treaties. They can, in effect, commit their States to substantial limitations for decades to come given that many TIAs have provisions that bind for 20 years after withdrawal from the agreement (such as with the ECT), well beyond an ordinary electoral cycle and even after a state leaves the treaty. Some States and entities like the EU require confirmation from the legislature before a treaty can be ratified, but this is not always the case (in the UK, for example, a TIA can be ratified without a vote in Parliament).

20. A number of States and organisations permit scrutiny of proposed TIA immediately prior to ratification. While the principle “some scrutiny is better than none” undoubtedly holds, pre-ratification scrutiny is of limited utility because the agreement in question has already been substantially determined between the negotiation teams. The agreement is, in practice, often a *fait accompli*. Scrutiny is only meaningful where there is a real prospect that it will lead to changes in an agreement. There are, therefore, three key stages at which scrutiny is required: (a) scoping/mandate where the parties determine what policy areas are to be (potentially) included in the agreement and their objectives therein; (b) negotiations – scrutiny should determine where the parties stand in relation to the original objectives and whether new proposals (i.e., not considered during scoping) are included; (c) pre-ratification. The EU is a world leader in making provisions for scrutiny at each of these key stages, but many states lag behind.

²⁶ The proposed EU Directive on corporate sustainability due diligence of 23 February 2022 seeks to mainstream environmental and human rights considerations through corporate governance and operations. It covers large EU-based companies with over 500 employees and more than € 150 million turnover worldwide (group 1) and those with over 250 employees and more than € 40 million turnover worldwide operating in high-impact sectors (group 2), notably textiles, agriculture, and the extraction of minerals.

²⁷ Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis*, (London; Cambridge University Press, 2014), p. 12.

²⁸ See the discussion of this in *Montague v. Secretary of State for International Trade*, 2020, UKFTT (UK First-tier Tribunal).

21. While trade and investment agreements have a number of problematic aspects from a democratic and rights perspective, they also offer an important opportunity. These agreements increasingly transcend both international and domestic norms and (for at least some of their provisions) contain robust and effective enforcement mechanisms. Trade and investment agreements therefore contain the potential to become an effective tool for the enhancement of democratic norms and human rights, including social rights.

5. Safeguarding core values and rights through trade

22. As briefly pointed out above, promotion and protection of core values and standards in international trade may occur universally, first and foremost at multilateral level via the WTO, or at regional level through bilateral or unilateral measures of large countries (such as the US, China, etc.) or country alliances (such as the EU), notably through the inclusion of specific chapters or provisions in trade and investment agreements.

23. On a multilateral level, the WTO Agreement on Safeguards²⁹ sets out some basic rules and enables the use of safeguard measures by WTO member countries. 'Safeguards' here mean emergency action to protect the domestic market via a temporary import restriction (for example, a quota or a tariff increase) that a country can impose on a product if such imports have caused or may cause serious injury to the importing country's industry. Normally, safeguards should not last for more than four years; in practice, they can be extended for up to eight years if deemed necessary. Developing countries may keep safeguards in place for up to ten years. However, safeguard actions lasting more than three years require a compensation in the form of substantially equivalent trade concessions.

24. A flexible interpretation of safeguards could also be used for protecting virtuous domestic economic activity against imports of goods that are produced without sufficient respect of basic standards. In social terms, international labour treaties (notably ILO conventions) set essential benchmarks for ensuring social and economic value, boosting productivity, business resilience and adaptability while protecting basic labour rights and ensuring a social protection floor. In addition, Article XX of the General Agreement on Tariffs and Trade (GATT, 1947) allows for general exceptions and the adoption of trade restrictive measures "necessary to protect human, animal or plant life or health". This provision permits the adoption of legislative measures aiming to ensure socially and environmentally fair trade.

25. However, differing standards and the race to the bottom for competitiveness reasons often render theoretical standards difficult to enforce across borders. This is precisely where unilateral measures and trade safeguards can come into play to compel lax countries to improve the implementation of basic social standards under pressure from more virtuous trading partners. I would highlight the need to seek to eliminate harmful child labour and forced labour, ensure implementation of minimum standards for health and safety at work and help raise subsistence levels above the national poverty rate. In this context, the EU leadership on due diligence could pave the way for socially and environmentally cleaner, more human-rights-compliant supply chains worldwide.

26. Friend-shoring may also be a way for advanced democracies to promote and consolidate values through trade agreements. For example, the EU-New Zealand trade deal has extensive environmental and social compliance built in, including the protection of rights of indigenous people. Old trade agreements can be retrofitted with upgrades where mutual consent of parties exists: this is a major area for future action. Thus, the UK could be encouraged to update its trade agreement with New Zealand based on the more progressive EU's approach.

27. At the same time, I must caution against any ratcheting down of environmental, health and social standards in negotiating new trade agreements, especially when there is little, if any, democratic scrutiny, accountability and transparency. The EU countries and the US seem to have greater democratic scrutiny and accountability at key stages of trade negotiations than many others, including my own country, the UK. In particular, the emergence of "freeports" in the UK should not be allowed to undercut level playing field competition economically, socially and environmentally, or in terms of public health.

6. Reinforcing policy coherence in favour of sustainable development: towards environmentally sound and socially fair development of trade policies

28. As the OECD studies show, trade and environment are closely linked through economic growth which can put unsustainable pressure on natural resources, generate pollution, and increase greenhouse gas emissions. At the same time, more trade can support economic development and social welfare, thus boosting capacity to manage the environment more effectively through access to new technologies that reduce the use

²⁹ See https://www.wto.org/english/tratop_e/safeg_e/safeint.htm.

of energy, water, and other resources and diminish the release of harmful substances into the environment. Moreover, trade policies and agreements may promote more stringent environmental standards throughout increasingly integrated and interdependent global supply chains. However, as environmental degradation and climate change continue, trade will be disrupted through impacts of extreme climatic events on maritime shipping and agriculture, resource depletion and price hikes for manufacturing, lower productivity of land, the spread of invasive species and zoonotic diseases, to mention just a few consequences.

29. With this in mind, how should trade and connected policies be adjusted? The OECD research argues that strong environmental policies are both compatible with trade and beneficial for its expansion if environmental goods and services are embraced and co-operation is strengthened on the global scale. The OECD also considers that trade can be a major driver of environmental sustainability through a combination of regulatory pushes, public awareness and consumer demand that support clean supply chains, waste treatment and recycling to recover raw materials and energy resources. At the same time, insufficient regulation in 'pollution havens' may lead to a concentration of environmentally harmful activities in hotspots away from public scrutiny. Maximising the environmental benefits from trade and minimising the risks requires, according to the OECD, the inclusion of environmental provisions in trade treaties, reduction of environmentally harmful subsidies and the cutting of tariffs on "green" goods and services, as well as policy coherence and targeted co-operation.

30. In late 2020, the WTO launched 'structured dialogue' on environmental sustainability and trade for interested member countries and other stakeholders. The WTO's Ministerial Statement of 2021 foresees discussions on trade and climate change, trade facilitation in environmental goods and services, the circular economy and sustainable supply chains. These structured discussions, involving 46 member States, could also pave the way towards a global agreement on environmental goods (progress in this area has stalled since 2016).³⁰ The existing WTO agreements already provide policy space for States to take measures to protect the environment. However, the WTO estimates that such measures should not be applied arbitrarily nor be "more restrictive than necessary to meet the objective".³¹

31. Council of Europe member States still face litigation risks before ad hoc tribunals as parties to 'old generation' international agreements on trade and investment when accelerating their energy transition to clean energy and implementing their commitments under the Paris Agreement, the European Climate Law and the European Green Deal. Even moving away from ISDS may not remove the risk of litigation before national courts. That said, it is possible to invoke a normative conflict between the treaty referred to in arbitration and the Paris Agreement – granting priority to the Paris Agreement, considering the latter as *lex posterior* that should prevail. Moreover, environmental due diligence obligations that are increasingly being applied across EU countries would strengthen the commitment of large private sector companies to forward-looking and environment-friendly ways of making business.

32. In a similar vein, we can see reasons for promoting European social standards through international trade which is one of the strongest instruments in the hands of European countries, especially in their relations with developing countries. Whilst the Paris Agreement sets the tone for national and international action against climate change, the UN Sustainable Development Goals (SDGs) embraced by the international community in the same year set the broader benchmarks for sustainable development, including a very substantive social dimension.

33. The EU as a major trading block of countries has particular powers. It introduced social conditionalities as early as 1995 with trade sanctions against goods made with the use of forced labour and prisoner labour. Later, a social incentives regime was promoted through trade preferences and an increasing emphasis on the ILO labour standards as part of human rights protection on a global scale. De facto, however, there is still disparity in the defence of the first and second generation of human rights and the level of vigour, as social standards are protected in a softer manner than market policies.

34. The 2022 independent comparative study of free trade agreements (FTAs) shows the increasing use of sustainable development provisions which cover environmental and labour issues, corporate social responsibility, gender and indigenous people's rights. This is particularly true of the EU's trade agreements, and other Council of Europe member States could follow the pattern. Switzerland deserves a special mention in this context because it played a precursor role in the drafting of specific provisions on social and environmental aspects of trade under new or revised FTAs since 2010. The study also shows that civil society participation plays an essential role in the monitoring of implementation of FTAs and stimulating domestic reforms that embed progressive standards on labour, the environment and human rights. Overall, the search

³⁰ See https://www.wto.org/english/tratop_e/envir_e/ega_e.htm for more information.

³¹ World Trade Report 2022: Climate change and international trade, WTO, Geneva.

for effective sustainable development provisions in trade treaties remains a dynamic, learning-by-doing process.³²

7. Conclusions and recommendations

35. It is clear that international trade and investment activity does not operate in a bubble insulated from other human activities. Occurring as it does on various levels, it interacts with values we cherish, rights we seek to protect and the vast societal context we want to improve in terms of democratic, socio-economic and environmental set up. Trade arrangements evolve with the society and its increased attention to sustainability issues and human dignity. We should therefore welcome individual countries' and trading blocks' efforts to develop trade in ways that help support progress in society through targeted co-operation, capacity building, increased sensitivity to the cause of sustainable development and the scaling up of commitments to preserve and improve our quality of life. All stakeholders have a role to play, including national parliaments and parliamentary assemblies such as ours.

36. Problems arise when commitments are not respected, standards are lowered or obligations disregarded. States are responsible for the shaping of policies and their implementation, including in trade matters. Trade and investment agreements are a powerful tool for advancing progress and should therefore be constantly adapted to realities and priorities. As rapporteur, I believe that all new treaties should contain strong provisions on sustainable development and human rights in line with the SDGs, and older treaties should be upgraded with new provisions to this end. This effort should in particular include adding references to widely agreed-upon international standards – such as those contained in the ILO conventions regarding social and labour issues, in the Paris Agreement regarding international climate goals and in other relevant international environmental law conventions.

37. We also face some unexpected legal complications when it comes to the modernisation of certain treaties (such as the ECT) whose sunset clauses or narrow interpretation by private arbitration tribunals (in the framework of the ISDS mechanism) expose States to expensive litigation, the lowering of standards (for protecting public health and the environment) and even policy reversals under pressure from influential enterprises. States should show more unity in demanding changes to these treaties or by agreeing on their new interpretation by setting up alternative mechanisms for dispute settlement, such as the EU's proposal for a Multilateral Investment Court, and by giving due consideration to the newest international treaties such as the Paris Agreement.

38. Regarding the specific issues linked to the ECT, we encourage States wanting to close the gap between the protection of investment and the climate goals, to negotiate and conclude an *inter se* modification agreement on the sunset clause of the ECT.³³ This would help send a clear message to other State Parties that such a long-lasting sunset clause is incompatible with their commitments under the Paris Agreement (paradoxically, the ECT's Preamble refers to the UN Framework Convention on Climate Change under the auspices of which the Paris Agreement was signed). This is permitted by international law according to Articles 41 and 64 of the Vienna Convention on the Law of Treaties (1969) and in absence of specific provisions in the ECT. Thereby, the sunset clause would be reduced or suppressed between State Parties to the *inter se* agreement - but it would survive in its previous version (20 years) vis-à-vis investors from other States. Despite such limitation, an *inter se* modification agreement should lead to a more socially and environmentally friendly interpretation of the ECT by national courts and arbitrators, relying on its own Preamble, its Article 19 and in line with other international conventions (Paris Agreement, Energy Charter Protocol on energy efficiency and related environmental aspects, etc.), and this pending a co-ordinated revision or withdrawal from the ECT.

39. We should acknowledge that unilateral measures in international trade (such as the EU's CBAM) may be necessary for States to pursue their ambition of advancing more rapidly towards sustainable and inclusive development. States should continue to take advantage of all possibilities offered by international trade and investments law to act unilaterally, including through the adoption of measures under Article XX of GATT and the WTO Agreements on Safeguards and on Sanitary and Phytosanitary Measures. International forums, such

³² Comparative Analysis of Trade and Sustainable Development (TSD) Provisions in Free Trade Agreements, The London School of Economic and Political Science, February 2022.

³³ As recommended in the study "Sunset Clauses in International Law and their Consequences for EU Law" (PE 703.592), Policy Department for Citizens' Rights and Constitutional Affairs of the Directorate-General for Internal Policies of the European Parliament, January 2022, and by the International Institute for Sustainable Development in their analysis "Energy Charter Treaty Reform: Why withdrawal is an option", <https://www.iisd.org/itn/en/2021/06/24/energy-charter-treaty-reform-why-withdrawal-is-an-option/>, 24 June 2021.

as the International Carbon Action Partnership (ICAP)³⁴, should then aim at globalising these virtuous developments and unilateral measures.

40. While this report has highlighted the need to mitigate the risks posed by arbitration to enforce provisions for investment protection based on trade and investment agreements, it is important to note also the opportunities they present. Although those provisions can be problematic when narrowly applied, they are highly effective in protecting the interests of investors. Their enforcement mechanism could be taken as a model for ensuring in the same way the honouring of provisions dealing with the environment, labour, and fundamental rights. In this way, we may draw lessons for the stronger protection of democratic decision making and Council of Europe values.

41. Finally, due diligence requirements should be promoted and enforced worldwide. Such requirements, paired with reporting obligations for companies, are key to enabling public and NGOs scrutiny. Cases on the basis of violation of due diligence and reporting obligations have been multiplying lately³⁵ and seem to be an effective tool for holding accountable and aligned with their social and environmental care duties. Purely economic trade agreements do not automatically promote human rights, democracy, the rule of law and sustainable development. Therefore, due diligence in supply chains with commensurate importance of these values should be built into trade and investment agreements. We also need to ensure that the technical negotiations factor in this through democratic engagement to ensure the public has a voice and influences change where our values, through being connected to the economic benefits of trade, can protect and promote them more widely.

³⁴ The ICAP aims at establishing a global carbon market, carbon price and CBAM. It provides an international forum for governments and public authorities implementing or planning to implement emissions trading systems. See: <https://icapcarbonaction.com/en>.

³⁵ Ever since the Shell case in the Netherlands, such cases have been multiplying. In France, for instance, cases are being brought against Total Energies, Nestlé, Suez, Danone, EDF, Yves Rocher, BNP, and others. Such cases and decisions by national courts will keep growing with the adoption of the proposed EU Directive on due diligence.